FILED

Supreme Court of the United States

OCTOBER TERM, 1932

No. [redacted] 14

W. A. YARBOROUGH, Petitioner,

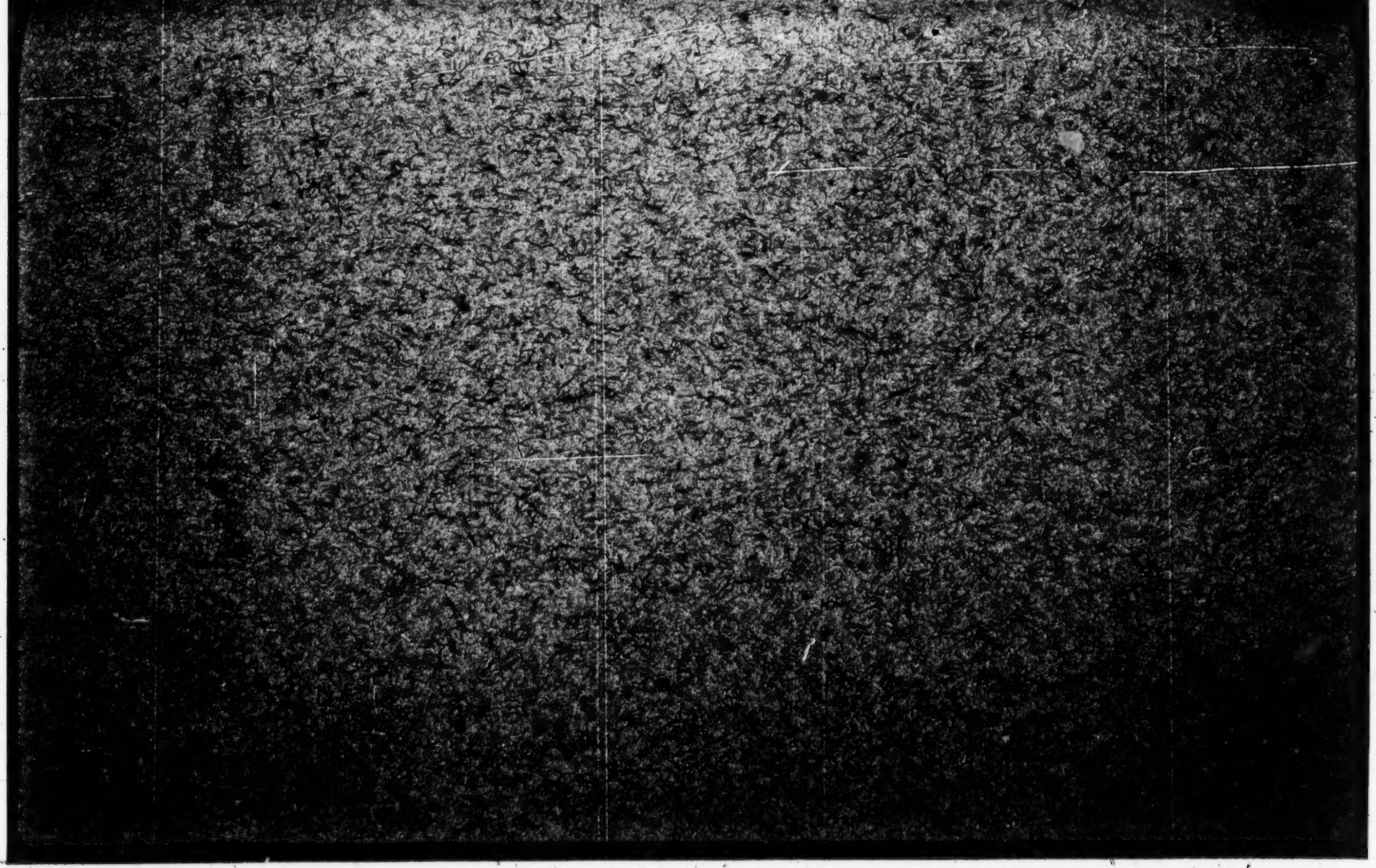
vs.

SADIE YARBOROUGH, by Her Guardian ad Litem, D. D. Blowers, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA AND BRIEF IN SUPPORT THEREOF

[redacted]

Solicitor for Petitioner.



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W. A. YARBOROUGH, PETITIONER,

versus

SADIE YARBOROUGH, BY HER GUARDIAN AD LITEM, R. D. BLOWERS, RESPONDENT

PETITION FOR WRIT OF CERTIORARI

R. E. WHITING,
STEPHEN NETTLES,
Counsel for Petitioner.

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May it Please the Court:

The petition of W. A. Yarborough respectfully shows to this Honorable Court:

A

SUMMARY STATEMENT OF THE MATTER INVOLVED

This action,—brought in the Court of Common Pleas for Spartanburg County, State of South Carolina,—involves the applicability of Article IV, Section 1, of the Constitution of the United States, which requires that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state".

The defendant, W. A. Yarborough, is a non-resident of South Carolina, domiciled in Georgia, where he obtained a final decree of divorce, of date June 7, 1929, in a proceeding brought in the Superior Court of Fulton County, Georgia. By decree made in the proceedings, of date January 19, 1929,—following the first jury verdict of divorce obtained on January 17, 1929,—Superior Court Judge Pomeroy, Atlanta Circuit, ordered and adjudged the payment by said W. A. Yarborough, of a specified amount, "in full settlement of temporary *and permanent* alimony in said cause." The decree required the transfer of a certain mortgage owned by defendant—to the extent of $1750.00—"to R. D. Blowers, of Spartanburg, South Carolina, as trustee for Sadie Yarborough, minor daughter of plaintiff and defendant," to be "expended by him in his discretion for the benefit of the minor child, including her education, support, maintenance, medical attention and other necessary items of expenditure". It was made a further provision of the decree that "upon the compliance of this order by the plaintiff (W. A. Yarborough), he shall be relieved of all *payments of alimony* and counsel fees, in said case, except that the payment due under the prior order of court, of the

sum of $50.00, for the month of January, 1929 shall be by him paid, in addition to the other amounts hereinabove named".

(See "Appendix A", annexed to this petition, for abstract of the Georgia Court proceedings; and "Appendix B", annexed to this petition, for pertinent provisions of Georgia statutes).

On August 20, 1929, Sadie Yarborough, the minor daughter of the divorced parents,—at that time about sixteen years old,—brought the present action, as a proceeding in equity, to compel the defendant, W. A. Yarborough (the petitioner herein), to pay a monthly allowance for supporting her at the home of her maternal grandfather at Spartanburg, South Carolina (where she was living with her divorced mother). Jurisdiction of the defendant was obtained by attachment; and funds belonging to him amounting to $2119.55 were attached in the action. Defendant, answering the complaint, made a general appearance; setting up the defense, as a bar to plaintiff's right of action, that under the judgment of the Georgia Court in the divorce proceedings brought in the Superior Court of Fulton County, Georgia, he had been required to pay $1750.00 to R. D. Blowers as trustee, for the permanent support of his daughter, which payment he had made, and that such payment operated in full and final discharge of his obligation to support his daughter, and that the decree in the Georgia Court was *res adjudicata* on the matter of support and binding on the South Carolina Court.

The case was heard in the Circuit Court (the Court of Common Pleas for Spartanburg County) on testimony taken before a Referee; and, on August 22, 1931, Judge Sease, Circuit Judge, filed a decree, holding that the judgment in the Georgia divorce action should not be construed, or considered, as determining the extent of the father's liability for the support of the child. (R., folios 588-590). The decree allowed plaintiff $50.00 per month and turned over the funds belonging to the defendant (attached in the action) to a trustee, to be used in making the monthly payments. (R., folio 597).

An appeal taken by the defendant (the petitioner herein) to the South Carolina Supreme Court raised the issue: "The judgment of the Georgia Court in the divorce suit is *res adjudicata* of the daughter's right to support from her father."

The pertinent exceptions (or assignments of error) were:

"2. Error in not holding that the judgment of the Georgia court in the divorce suit absolved the defendant from further liability for the support of his minor daughter, the plaintiff herein, he having made the provision for her support required by said judgment.

"3. Error in not holding that the judgment of the Georgia court in the divorce suit was a bar to this action, being res adjudicata of this defendant's liability to support his minor daughter, and said judgment being binding on the South Carolina courts under Article IV, Section 1, of the Constitution of the United States of America.

"8. Error in holding that the $1750.00 provided by the judgment of the Georgia court for the support of defendant's daughter 'is entirely inadequate to support, educate, and maintain her in her station in life, and it necessarily follows, therefore, that the father is bound both morally and legally to see that she is properly provided for.' It is respectfully submitted that the judgment of the Georgia court provided $1750.00 for the permanent support of the daughter; that said judgment was res adjudicata of the matter of support; and that the court below was bound to accord that judgment the full faith and credit required by Article IV, Section 1, of the Constitution of the United States of America."

(R., folios 605-606 and 610-611).

The Supreme Court of South Carolina, on June 27, 1932, filed its decision against defendant, affirming the decree of the Circuit Court on the ground (1) that the Georgia Court did not have jurisdiction of the minor daughter, to determine her rights, as she was not a party to the action; and (2) that the

order containing the provision for the support of the minor daughter was a consent order, and did not conform to the provisions of the Georgia Code in respect to the matter of determining the liability for the support of the minor children.

A petition for rehearing was filed by defendant (the petitioner herein).

The South Carolina Supreme Court, on December 27, 1932, filed an order denying the petition for rehearing on the ground (1) that the child, Sadie Yarborough, " was never personally within the jurisdiction of the Superior Court of Fulton County, Georgia, was never served with any process in that case, nor was she ever represented therein by guardian *ad litem;*" (from opinion, 168 S. C., at page 59); and (2) "that the Superior Court of Fulton County, Georgia, while acquiring jurisdiction of W. A. Yarborough and Susie Yarborough, never acquired jurisdiction of the person of the infant, Sadie Yarborough, in a suit for divorce between the parents." The Court further said:

> "As to her that judgment is a nullity, and does not render the issues in the present case between her and her father, in the Court of Common Pleas for Spartanburg County, in the State of South Carolina, res adjudicata." (From opinion 168 S. C., at page 62.)

B

Reasons Relied on for the Allowance of the Writ

1. The State Court has decided a federal question of substance not heretofore determined by this Court. The federal question involved in the State Court decision was the applicability of the full faith and credit clause of the United States Constitution to a decree of the court of another state adjudging, in a divorce proceeding, the payment of a specified sum in lieu of permanent alimony for the support of the child. Was such decree binding and effective as an adjudication of the rights of the minor child so as to bar subsequent independent action—in her personal behalf—to compel the father to make

an allowance for her support? There is no Federal Supreme Court decision directly determinative of the effect of divorce court proceedings as an adjudication of the extent of the father's duty toward a child awarded to the custody of the mother.

2. The State Court has decided a federal question of substance, in a way probably not in accord with applicable decisions of this court. The cases of *Sistare v. Sistare* 218 U. S. 1, *Bates v. Bodie* 245 U. S. 520, and *American Surety Company v. Baldwin* (decision of November 14, 1932—United States Supreme Court advance opinions (77 L. ed.), at page 125,—while not conclusively in point,—are thought to be applicable to control the determination of the federal question involved, and to compel a different ruling from that declared in the State Court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the South Carolina Supreme Court, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 290, *Sadie Yarborough by her guardian ad litem, R. D. Blowers, Respondent, v. W. A. Yarborough, Appellant,* and that the said judgment of the South Carolina Supreme Court may be reversed by this Honorable Court, and that your petition may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

Dated March 20, 1933.

W. A. YARBOROUGH,
By: R. E. WHITING

STEPHEN NETTLES,
Counsel for Petitioner.

APPENDIX A.

Record of Georgia Divorce Proceedings

On September 21, 1927, W. A. Yarborough filed suit for total divorce against Susie B. Yarborough in the Superior Court of Fulton County, Georgia. The verified complaint alleged that the plaintiff was, and had been for more than twelve months last past, a bona fide resident of Georgia; that defendant was a resident of Hendersonville, N. C.; that the parties were married in 1904; that they had separated in February, 1927; that they had one child, Sadie, aged 12; and that the divorce was sought on the ground of mental and physical cruelty and threats by defendant against plaintiff that made him fear for his life, health, and well-being.

The defendant wife was served by publication, and on November 25, 1927, she appeared by counsel and filed an answer and cross-bill, the same being verified by her affidavit. By her answer, she admitted the formal and denied the substantial allegations of plaintiff's bill. By her cross-bill defendant alleged that she had been a true and affectionate wife, but that plaintiff had been guilty of various acts of physical and mental cruelty toward her, and that he was guilty of adultery. Her prayer was for a total divorce; the custody of the child; an injunction against plaintiff's disposing of his property pending the litigation; "that provision for permanent alimony be made for the support of respondent and the minor child above mentioned and for the education of said minor child;" and "that petitioner be required to pay into court a reasonable sum to defray the expenses of this action and for counsel fees, and that he be required to pay to petitioner such further sums for temporary alimony for the support of herself and her minor child, during the pendency of these proceedings, as may seem just to the court."

On November 26, 1927, the day after the wife's answer and cross-bill were filed, an order was made requiring the husband to show cause on December 3, 1927, "why the prayer of said

answer and cross-bill for temporary alimony and counsel fees should not be granted." On January 12, 1928, a consent order was entered, requiring the plaintiff to "pay to the defendant, Susie B. Yarborough, by the 10th day of each month the sum of $125.00 per month as temporary alimony for her support, and $75.00 per month for the support of the minor child, Sadie Yarborough, until the further order of the court or the final disposition of this case." Plaintiff was also ordered to pay defendant's attorneys $100.00 "on account of attorney's fees."

On February 29, 1928, the plaintiff filed a petition for reduction of temporary alimony. The petition referred to the consent order of January 12, 1928, "for the payment of temporary alimony and counsel fees in the above stated case, whereby petitioner was to pay $125.00 per month for the support and maintenance of the said Mrs. Susie B. Yarborough, and $75.00 per month for the support, maintenance and education of their minor daughter, Sadie Yarborough," and set out certain grounds on which he asked the court for "a reduction in said alimony to the sum of $100.00 per month," and that the total fee of defendant's attorneys be fixed at $100.00. This petition also stated that Mrs. Yarborough was refusing to let him see his daughter except in her presence, and he asked to be allowed to visit his daughter, and to have her with him at specified times apart from her mother. A rule to show cause issued, and a hearing was had before the court on April 17, 1928, on the portion of the petition praying for the privilege of seeing his daughter, and on the same day the following order was passed:

> "It is therefore, considered, ordered and adjudged that the plaintiff be and he is hereby allowed the privilege of visiting his said minor daughter, and of having her with him, out of the presence of the defendant, on the second and fourth week-ends of each month, from the close of school hours Friday until Sunday night of said week ends, during school terms, and at like times during vacation; at which times the plaintiff shall be entitled to take said minor daughter on pleasure trips of reasonable dis-

tance returning her punctually at the conclusion of the alloted time."

On June 8, 1928, the defendant filed an answer to so much of the plaintiff's petition as sought a reduction in alimony and counsel fee, in which she alleged that plaintiff had not paid the $100.00 attorney's fee theretofore ordered by the Court, and that plaintiff "is in default in the payment of alimony in accordance with the previous order of this court in the sum of $100.00 for the month of March, $100.00 for the month of April, $100.00 for the month of May, and $200.00 for the month of June." She asked that the petition be denied, that she have judgment for the above sums, and that the plaintiff be adjudged in contempt.

On June 9, 1928, the following order, omitting caption, was made:

"The foregoing matter coming on to be heard upon the plaintiff's petition for reduction of alimony, and limitation of attorney's fees, and after the introduction of evidence by plaintiff and defendant thereon, and after hearing from counsel for both plaintiff and defendant.

"It is considered, ordered and adjudged that the order of this Court dated January 12th, awarding alimony and attorney's fees to the defendant, Mrs. Susie B. Yarborough, be and the same is hereby revoked, and in lieu thereof, it is considered, ordered and adjudged that from and after the passage of this order the plaintiff, W. A. Yarborough, pay to the defendant, Mrs. Susie B. Yarborough, for the support and maintenance of herself and the minor daughter, Sadie Yarborough, the total sum of One Hundred Dollars ($100.00) per month, to continue until the further order of the Court in the premises, the first payment hereunder to be made for the current month of June, 1928, and that the plaintiff pay to defendant's attorneys, Messrs. Jones, Evins, Moore and Powers and Ralph Williams, a total fee of One Hundred Dollars ($100.00) against which shall be credited all sums heretofore paid during the pendency of said case, to said attor-

neys, which shall be in full of the plaintiff's obligation to pay defendant's counsel in said litigation, said fee to be paid on or before October 1st, 1928.

"It is further ordered that all unpaid alimony which has accrued heretofore under the Court's order of January 12th, 1928, be, and the same is hereby cancelled and the plaintiff is relieved from the obligation to pay the same. Ordered further, that in the event of the failure of the defendant to comply with the Court's order dated the.... day of April, 1928, allowing the plaintiff the privilege of visiting his said minor daughter, Sadie Yarborough, at times and places specified in said order, that the plaintiff shall have the right upon due proof of the facts, and after hearing thereon, to an order relieving him of all obligation to pay alimony under this order.

"This 9th day of June, 1928.

(Signed) "JOHN D. HUMPHRIES,
Judge Superior Court,
Atlanta Circuit."

On October 24, 1928, plaintiff filed another petition in which he referred to the order of June 9, 1928, in which the court passed upon "petitioner's application to reduce the monthly payments of alimony," and also referred to the last paragraph of said order, regarding plaintiff's right to be relieved from the payment of any alimony to his wife, if she did not permit him to see his daughter, as provided in the previous order of the court. The petition then went on to recite that defendant had prevented petitioner from seeing his daughter in accordance with the order of the court; that she had attempted to extort money from him by threatening to prosecute him criminally on a false charge, and failing to obtain the money, she had, on July 17, 1928, sworn out a warrant against him in Spartanburg, S. C., charging him with having fraudulently obtained her signature to an assignment to the insurance company of an insurance policy in which she was the beneficiary by representing to her that he was in dire need of funds when

he was not, and that he had cashed the check obtained from the insurance company, which was payable to their joint order, and converted the proceeds to his own use; that the truth was that the money was realized by surrendering a policy of insurance on his life, as he could not carry it longer, and that he paid over the money to his wife in cash or used it in paying extravagant bills she had created without his knowledge or consent; that she had caused his arrest on the warrant and his confinement in jail in Atlanta until he waived extradition and went to Spartanburg and made bond; that, while he had managed to pay the alimony provided by the order of June 9, 1928, the expense his wife had subjected him to in connection with the warrant had exhausted his funds and made it impossible for him further to keep up the alimony payments; and that his wife had in her possession an automobile of his, and he desired it sold and the proceeds paid to his wife on account of future alimony payments. The prayer of the petition was for the reduction of "said alimony payments until petitioner has had an opportunity to meet the other expenses forced upon him by the defendant"; that the automobile be sold, and "that the court order all further payments of alimony, in so far as they are for the support of the defendant, indefinitely withheld until sufficient guarantees are made that petitioner will be allowed to enjoy regular visits with his said minor daughter without the presence of the defendant."

On December 7, 1928, the following order, omitting caption, was filed:

> "The petition of plaintiff for a reduction of alimony payments, for the sale of an automobile, and for changes in the order permitting plaintiff to visit his minor daughter, which said petition was filed October 24th, 1928, coming on for a hearing, upon hearing evidence and argument on behalf of both plaintiff and the defendant, it is considered, ordered, adjudged and decreed as follows:
>
> "The court declines to interfere with the possession and ownership by defendant of the automobile referred to in said petition. The court declines to make any change in

order permitting plaintiff to see his minor daughter, and finds that defendant has partly complied with said order of court. It is ordered that the amount of alimony due by plaintiff to defendant be reduced for the months of December, 1928, January, February, and March, 1929, to the sum of Fifty Dollars ($50.00) per month for these four months, but that beginning with the month of April, 1929, said reduction shall cease and said payments shall be One Hundred Dollars ($100.00) per month as before the passage of this order.

"The defendant having testified and the plaintiff, W. A. Yarborough, having also testified that the plaintiff has loaned out the sum of Five Thousand Dollars ($5,000.00) secured by first loans on real estate in Spartanburg, S. C., which loans draw interest at the rate of 7% per annum, it is further considered, ordered and decreed that the plaintiff, W. A. Yarborough, be and he is hereby enjoined from disposing of, or encumbering, or in any other manner changing the status of Four Thousand Dollars ($4,000.00) worth of said first loans until the further order of this court, but that Four Thousand Dollars ($4,000.00) worth of said loans be held without change subject to such decrees and judgments as have been rendered or may hereafter be rendered in favor of the defendant for alimony.

"This December 7th, 1928.

(Signed) "E. D. THOMAS,
Judge Superior Court,
Atlanta Circuit."

On January 17, 1929, the case was tried to a jury and they rendered the first total divorce verdict, as follows:

"We, the jury, find that sufficient proofs have been submitted to our consideration to authorize a total divorce; that is to say, a divorce a *vinculo matrimonii*, upon legal principles between the parties in this case. This 17th day of January, 1929.

(Signed) "H. M. DODD, Foreman.

On January 19, 1929, the following consent order omitting caption, was made:

"Parties, plaintiff and defendant, having personally, in writing, consented hereto, and their respective counsel of record having likewise consented in writing hereto,

"It is considered, ordered and adjudged that the following settlement be hereby made the order of the Court, the same being in full settlement of temporary and permanent alimony in said case, and in full settlement of all other demands of every nature whatsoever between the parties:

"The plaintiff, W. A. Yarborough, being the owner of two certain real estate mortgages, each of the principal sum of Two Thousand Dollars ($2,000.00), and bearing interest from their respective dates at seven per cent (7%) per annum, executed by McDowell and by Hammond, said mortgages being first liens upon real estate in the city of Spartanburg, South Carolina, and not having been heretofore transferred, sold or encumbered by the plaintiff, the plaintiff having heretofore been restrained by the order of this Court from disposing of the same,

"It is considered, ordered and adjudged that said mortgages be, and they are hereby transferred, sold and assigned by the plaintiff, W. A. Yarborough, to the defendant, Mrs. Susie B. Yarborough to the extent of One Thousand, Seven Hundred, Fifty Dollars ($1,750.00), and the plaintiff, W. A. Yarborough, does hereby transfer, sell and assign said mortgages to R. D. Blowers, of Spartanburg, South Carolina, as Trustee for Sadie Yarborough, minor daughter of plaintiff and defendant, to the extent of One Thousand, Seven Hundred Fifty Dollars ($1,750.00), the said Mrs. Susie B. Yarborough and the said R. D. Blowers as Trustee as aforesaid, shall have the right, at their option, to pay to the plaintiff, W. A. Yarborough, a sum equal to Two Hundred Fifty Dollars ($250.00) and accrued interest upon each of said mortgages, having an absolute transfer to each of them as

aforesaid, on the other hand, or to require that said mortgages be sold and the said Mrs. Susie B. Yarborough and the said R. D. Blowers, as Trustee, each to receive the sum hereinbefore stated and the plaintiff, W. A. Yarborough, to receive the balance of the proceeds of said sale. The amount to be thus received by R. D. Blowers, as Trustee for Sadie Yarborough, minor daughter of plaintiff and defendant, shall be expended by him in his discretion for the benefit of the minor child, including her education, support, maintenance, medical attention and other necessary items of expenditure.

"Upon the compliance with this order by the plaintiff, he shall be relieved of all payments of alimony and counsel fees, in said case, except that the payment due under the prior order of Court of the sum of Fifty Dollars ($50.00) for the month of January, 1929, shall be by him paid, in addition to the other amounts hereinbefore named. The plaintiff, W. A. Yarborough, shall comply with the terms of this consent order at the earliest possible date, and at all events not later than January 27, 1929.

"The provisions of the order of the Court heretofore entered fixing the times and places when plaintiff, W. A. Yarborough, shall have the right to visit and have with him, out of the presence of the defendant, the said Sadie Yarborough, minor daughter of plaintiff and defendant, are hereby continued in force.

"This 19th day of January, 1929.

(Signed) "EDGAR E. POMEROY,
Judge Superior Court,
Atlanta Circuit."

"We, plaintiff and defendant respectively, hereby consent to the above and foregoing order.

"This 17th day of January, 1929.

(Signed) "W. A. YARBOROUGH,
Plaintiff.

(Signed) "HAL LINDSAY,
Plaintiff's Attorney.

(Signed) "SUSIE B. YARBOROUGH,
Defendant.

(Signed) "WRIGHT & DAVIS
by JAS. C. DAVIS,
Defendant's Attorneys."

On June 7, 1929, as provided by law, the case was again tried to a jury, and they rendered the second total divorce verdict, as follows:

"We, the jury, find that sufficient proofs have been submitted to our consideration to authorize a total divorce; that is to say, a divorce a *vinculo matrimonii*, upon legal principles between the parties in this case. We fix the rights and disabilities of the parties as follows: The plaintiff shall be at liberty to marry again. This 7th day of June, 1929.

(Signed) "FRED A. CADIEU, *Foreman.*"

On the same day, June 7, 1929, the following decree of Court in total divorce was entered:

"Two concurring verdicts favoring a total divorce to plaintiff having been rendered in the within case, it is considered, ordered and adjudged that said marriage be, and the same is hereby annulled and a total divorce granted between the parties, with liberty to the plaintiff to marry again. The defendant shall be at liberty to marry again. Jurisdiction of said case is retained for the purpose of further enforcement of orders of this Court heretofore

passed. Ordered further that the defendant pay the costs of these proceedings.

This 7th day of June, 1929.

(Signed) "EDGAR E. POMEROY,
Judge Superior Court,
Atlanta Circuit.

APPENDIX B.

Pertinent Provisions of Georgia Statutes and Decisions of the Georgia Court Construing Such Provisions.

At the trial before Judge Sease the defendant offered in evidence the following sections of the Georgia Code of 1926 annotated, and decisions of the Georgia Courts:

Sect. 2981 (Sect. 2462) ALIMONY FOR CHILDREN ON FINAL TRIAL.—If the jury, on the second or final verdict, find favor of the wife, they shall also, in providing permanent alimony for her, specify what amount the minor children shall be entitled to for their permanent support; and in what manner, how often, to whom, and until when it shall be paid; and this they may also do, if, from any legal cause, the wife may not be entitled to permanent alimony, and the said children are not in the same category and when such support shall be thus granted, the husband shall likewise not be liable to third persons for necessaries furnished the children embraced in said verdict who shall be therein specified."

"Sect. 2982. (Sect. 2463) JUDGMENTS, HOW ENFORCED.—Such orders, decrees, or verdicts permanent or temporary, in favor of the children or family of the husband, may be enforced as those in favor of the wife exclusively."

Maddox v. Patterson, 6, S. E. 581.
Coffee v. Coffee, 28 S. E. 977.
Brown v. Brown, 64 S. E. 1092.
Wilkins v. Wilkins 91, S. E. 415.

Gilbert v. Gilbert, 107 S. E. 490.
Johnson v. Johnson, 62, S. E. 1044.

APPENDIX C.

Pertinent Provisions of South Carolina Statutes.

Statutory provisions are contained in South Carolina Code of 1932,—relative to the parental obligation to provide adequate support for minor children and to the reciprocal parental right of control,—as follows:

"Sect. 255. (19): Neglect of Child a Misdemeanor. * * * Abandonment (etc.),—* * * If any person shall willfully abandon his family without providing adequate support for his wife, and the children which he may have begotten upon her, he shall be guilty of a misdemeanor.

"If the fact of abandonment or any failure to provide adequate support for the wife and children shall be proved, or while living with such wife, neglect by the husband to provide for the adequate support of such wife or children shall be proved, then the fact that such husband neglects applying himself to some honest calling for the support of such wife or children and is found sauntering about endeavoring to maintain himself by gaming or other undue means or is a common frequenter of drinking houses, or is a known common drunkard, shall be presumptive evidence that such abandonment is willful.

"Upon any conviction for abandonment, any judge having jurisdiction thereof may, in his discretion, make such order as in his judgment shall best provide for the support as far as may be necessary, of the deserted wife or children, or both, from the property or labor of the defendant.

"If any husband while living with his wife shall willfully neglect to provide adequate support for such wife or children which he has begotten upon her, he shall be guilty of misdemeanor."

"Sect. 1123: Misdemeanor for Husband to Fail to Support Wife and Children.—Any able-bodied man or a man capable of earning or making a livelihood who shall, without just cause or excuse, abandon or fail to supply the actual necessaries of life to his wife or to his minor, unmarried child or children dependent upon him, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be imprisoned for a term of not exceeding one year, or be liable to a fine of not less than three hundred dollars nor more than fifteen hundred dollars, or both, in the discretion of the court; * * *

"Sect. 8638: Mother and Father to Have Equal Rights in Custody, Etc., of Minor Children.—The wife and husband are the joint natural guardians of their minor children and are equally charged with their welfare and education, and the care and management of their estates; and the wife and husband shall have equal power, rights and duties, and neither parent has any right paramount to the right of the other concerning the custody of the minor or the control of the services or the earnings of such minor or any other matter effecting the minor. Neither parent shall forcibly take a child from the guardianship of the parent legally entitled to its custody. The welfare of the minor shall be the first consideration and the court having jurisdiction shall determine all questions concerning the guardianship of the minor. Nothing herein contained shall be construed to relieve the father of his common law obligation to support his children, nor shall it be construed to increase the liability of the mother to support the children."

"Sect. 8668: Employers of Minors Liable to Parents or Guardians.—If any person shall hire or employ any minor, or person under the age of twenty-one year, without the knowledge and consent of the parents or guardian of such minor, such person shall pay to said parents or guardian the full value of the labor of said minor from and after notice from the parents or guardian that payment of such

service shall be made to him or them, as the case may be: *Provided*, This section shall not apply to cases where the parents or guardian fails or refuses to furnish the minor a home and support, in which cases the minor shall have the right to make contract in regard to his own labor and enforce same in his own name and for his own benefit, and the employer shall be responsible to the minor only in such cases."

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Opinion of the Court Below

The opinion in the South Carolina Supreme Court is officialy reported in 168 S. C. 46 (Advance Sheets, S. C. Reports), and is also reported in 166 S. E. 877.

A petition for rehearing was filed; and this was refused in an opinion officially reported in 168 S. C. at page 59 (Advance Sheets, S. C. Reports).

II

Jurisdiction

1. The statutory provision believed to sustain the jurisdiction is Section 237, amended, of the Judicial Code (28 U. S. C. A., 344 (b)) as follows:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution," etc.

2. The decision sought to be reviewed was first filed on June 27, 1932. A petition for rehearing being, however, presented to the South Carolina Supreme Court, the order denying the petition, and constituting a final adjudication of the cause, was filed of date, December 23, 1932.

3. The answer filed by defendant (R., folios 15-20) invokes the protection of the full faith and credit clause of the Federal Constitution. The appeal from the lower court to the Supreme Court of South Carolina raised the issue: "The judgment of the Georgia Court in the divorce suit is *res adjudicata* of the daughter's right to support from her father." (From opinion, 168 S. C., at page 51). The holding of the opinion was that the question of the extent of the father's liability for the support of the child was not adjudicated in the Georgia action (168 S. C. 46, 57).

4. The following cases are believed to sustain the jurisdiction:

American Surety Company v. Baldwin (decision of Nov. 14, 1932);
Bates v. Bodie, 245 U. S. 520;
Sistare v. Sistare, 218 U. S. 1;
Haddock v. Haddock, 201 U. S. 562.

III

Statement of the Case

Supplementary facts to those set out in the "Summary Statement of the Matter Involved", as made in the petition herein,—pertinent to show the situation of the respondent as a child of divorced parents, for whom provision was made by the decree of the Georgia court in the divorce action,—are as follows:

The defendant, W. A. Yarborough, and his family, consisting of Susie B. Yarborough, his wife, and Sadie Yarborough, his daughter, were living together in Atlanta, Georgia, at a home provided by said defendant, for about a year prior to the commencement of the divorce proceedings.

The family went to Atlanta about September 5th or 6th, 1926 (R., folio 242). The daughter attended public school in Atlanta for the school year 1926-27; and after school ended, in June, 1927, the wife went to Hendersonville, North Carolina (R., folio 243); the daughter first going to Camp Fire Girls Camp, at Toccoa, Georgia, and later, in the summer, to Hendersonville, North Carolina. (R., folios 244, 245)

Yarborough filed divorce proceedings by publication on September 21, 1927, in the Superior Court of Fulton County, Georgia. The wife was served by publication; but, on November 25, 1927, she appeared by counsel and filed an answer and cross-bill. In the cross-bill Mrs. Yarborough asked for a total divorce, the custody of the child, temporary alimony for the support of herself and the child during the pendency of the action, and "that provision *for permanent alimony* be made for the support of respondent, and the education of said minor child." (R., folio 503; or, see "Appendix A" attached to the petition herein).

On November 26, 1927 W. A. Yarborough, having been ordered to show cause, a consent order was taken, whereby $125.00 per month was allowed as temporary alimony for his wife and $75.00 per month as temporary support of the child. On February 29, 1928, W. A. Yarborough filed a petition for reduction of temporary alimony. On June 9, 1928 a consent order was taken reducing the amount for the wife and daughter to $100.00 per month. On October 24th W. A. Yarborough filed another petition for reduction of amount payable to his wife and daughter. On December 7, 1928 an order was made reducing the amount from $100.00 to $50.00 per month for the months of December, 1928 and January, February and March, 1929, thereafter payments to be restored to $100.00 per month. On January 17, 1929 the case was tried by a jury resulting in a verdict of total divorce (Appendix A of this petition). On January 19, 1929, the Superior Court of Fulton County, Georgia passed a consent order under which W. A. Yarborough was to pay the wife $1750.00. By the terms of the same order, he was also required to pay $1750.00 for the support of Sadie Yarborough, his minor daughter, said payment to be made to R. D. Blowers, as trustee for Sadie Yarborough (see copy of order, Appendix A). The payments required by the Georgia decree were paid. On June 7, 1929, the second divorce verdict was rendered by the jury. On the same date, June 7, 1929, the Superior Court of Fulton County, Georgia, made an order, based on the second jury verdict, granting and decreeing a total divorce.

The lump sum provision—$1750.00 for the wife and $1750.00 for the minor daughter—took the greater part of Yarborough's entire property holdings (R., folios 303-326).

A few months after the divorce, Yarborough remarried. The daughter, Sadie Yarborough, living with her divorced mother in South Carolina, became estranged from her father on account of the divorce and his remarriage, telling and writing him that she did not want to see him (R., folios 219-227, 556-557).

The maternal grandfather, W. D. Blowers (at whose home Sadie Yarborough was living after the court had awarded her custody to her mother) testified as a witness, stating his ability and his willingness to provide for his granddaughter, if her father couldn't do it.

On being asked as to the amount of allowance necessary for the support of his granddaughter, Mr. Blowers said:

> "I know that I would hate to deprive her of anything that I thought I could give her. * * * When she says she wants so and so, I give it to her. If she wants to go to the show I do not limit her. I pay as much as $3.30 for a seat in the theatre. I do not give them gallery seats or anything like that. I give them the best I can afford. (R., folios 69, 72).
>
> "Q. Do you think it is the duty of her father to furnish her theatre tickets at that price?
>
> "A. Oh, yes. He is well and able to do it. * * * I think he is able to take good care of his own blood child."

IV

SPECIFICATIONS OF ERROR

1.

The court erred in finding and holding (a) that the order of the Georgia Court in the divorce action between the parents was insufficient to bind the plaintiff as it did not conform to the requirements of the Georgia Code; and (b) that the Georgia

Court had not rendered such final judgment—fixing the total extent of the father's liability for the support of the child—as to constitute an adjudication in respect of the question of the support of the child.

(The sub-specifications (a) and (b) of specification 1 covering essentially the same point, will be treated together.)

2.

The court erred in finding and holding (a) that the judgment of the Georgia Court determining the amount of the alimony defendant should pay is not binding on the South Carolina courts under the full faith and credit clause of the United States Constitution, as the Superior Court of Fulton County of the State of Georgia—while acquiring jurisdiction of the parents (W. A. Yarborough and Susie B. Yarborough)—did not acquire jurisdiction of the person of the child (Sadie Yarborough) in the suit for divorce between the parents; and (b) that the judgment in the Georgia divorce action is a nullity as to the child and does not render the issue (of the support of the child) *res adjudicata* in the present action between her and her father.

(The sub-specifications (a) and (b) of specification 2, covering essentially the same point, will be treated together.)

V

ARGUMENT

SUMMARY OF THE ARGUMENT

The petitioner contends:

A

1. The decree of divorce made by the Georgia Court in the divorce action between the parents fixed the total extent of the liability of the father and required him to make a lump sum payment to the trustee (in lieu of awarding a monthly allowance of alimony) for the support of the child.

(See Order of Judge Pomeroy, of date January 19, 1929—set out in this petition as "Appendix A.")

2. Such decree of the Georgia Court was an adjudication in respect of the matter of support of the child; and was designed to be, and was, effective to give custody of the child to the wife and to absolve the father (the petitioner herein) from further legal obligation or duty to support the child given by said decree to the custody of the mother.

CITATIONS MAINLY RELIED ON

Coffee v. Coffee, 101 Ga. 787, 28 S. E. 977—The syllabus of the case (prepared, as in all of the Georgia cases, by the court) holds: "Where, in the progress of a suit for a divorce, upon the application of the wife for an allowance of alimony, temporary and permanent, *a decree by consent of parties is rendered*, wherein a sum certain is awarded to the wife, to be paid at stated intervals, and to be by her applied to the support of the minor children, who were, by the same decree, committed to her care, after the termination of the divorce suit, and the rendition of a final decree therein, which was not excepted to, the decree allowing alimony passes beyond the discretionary control of the Circuit Judge, and he has then no authority either to abrogate it or to modify its terms."—The opinion (discussing the question of the effect of a consent judgment) concluded: "*In the present case the parties dispensed with a jury trial upon the question of an allowance of permanent alimony, and, by consent, invoked a decree of the court fixing the allowance upon the terms stated in the decree. This consent having been approved by the court in which the cause was pending, after the grant of the divorce, the court loses control over the subject, and the decree stands as other judgments against the husband.*"

B

1. The Superior Court of Fulton County of the State of Georgia,—in acquiring jurisdiction of the parents (W. A. Yarborough and Susie B. Yarborough) in the divorce

action brought in that court,—had full and unquestionable jurisdiction over all family matters arising out of the marriage relationship involved in said action; and had jurisdiction given by the statute laws by the State of Georgia to make final and effective provision as to the custody of the child born of said marriage; and, correlative with the right to award the custody of said child, had jurisdiction to pass upon and determine the extent of the father's duty to provide for the maintenance and education of the child.

CITATIONS MAINLY RELIED ON

Coffee v. Coffee, 101 Ga. 787, 28 S. E., 977; *Exchange Banking & Trust Co. v. Finley*, 73 S. C. 423, 53 S. E., 649; and *Anderson v. Anderson*, 74 W. Va. 124, 81 S. E., 706.—The child's legal domicil was in Georgia (the place of the father's domicil) and remained there until the Georgia Court decree awarded her custody to her mother. *Barber v. Barber*, 21 How. 582; *Lamar v. Micou*, 112 U. S. 452; *Anderson v. Watt*, 138 U. S. 694.—Ordinarily parent's duty to child is limited to providing support at his place of residence. *State v. Scurry*, 114 S. C., 191; *State v. Lancaster*, 135 S. C., 412, 416.—Duty of parent to support and educate child is reciprocal (or corresponding to) the right of control and is an obligation which is in nearly all of the states enforced under compulsory laws. *Thompson v. Ga. Ry. & Power Co.*, 163 Ga. 598, 136 S. E. 895; *Meyer v. Nebraska*, 262 U. S. 390, 400.

2. The decree of the Georgia Court,—made in the exercise of the jurisdictional powers given said court by the statute laws of the State of Georgia,—specifically determined and adjudged the rights and duties of the father in respect of the custody and support of the child, and rendered the said issue (in respect of the support of the child) res adjudicata within the protection of the full faith and credit clause of the Constitution of the United States.

CITATIONS MAINLY RELIED ON

"The principles of *res adjudicata* apply to questions of jurisdiction as well as other issues." *American Surety Co. v. Baldwin* (United States Supreme Court, Advance Opinions—decision of November 14, 1932).—The applicability of the full faith and credit clause to the Georgia judgment (the decree of January 19, 1929) rests on the interpretation of the Georgia law, the issues made by the pleadings in the Georgia divorce case, and the decree of the court granted therein. *Bates v. Bodie*, 245 U. S. 520; and *Sistare v. Sistare*, 218 U. S. 1. "*The obvious answer would seem to be that for the issues we must go to the pleadings; for the response to them and their determination, to the judgment;* and that each may furnish a definition of the other." (245 U. S., at page 526). "While the ruling of the court was, of course, primarily based upon the interpretation of the (state) law, the ultimate ruling as to the inapplicability of the full faith and credit clause of the Constitution was expressly rested upon the decision of this court." (218 U. S., at page 10.)

POINT A.

The decree made by the Georgia Court fixed the total extent of the father's liability for support of the child.

It should be kept in mind that the cross bill filed by the wife to the husband's suit for divorce prayed for the custody of the child, and also prayed "that provision for permanent alimony be made for the support of respondent and the minor child above mentioned, and for the education of said minor child." The response to this prayer is the decree of January 19, 1929, which is set out in full in "Appendix A", annexed to the petition herein. The first thing adjudged by the decree is that "the following settlement be hereby made the order of this court, the same being in full settlement of temporary **and permanent alimony** in said case, and in full settlement of all other demands of every nature whatsoever between the parties." (R., folio 533). Further on in the decree it is adjudged that $1,-

750.00 shall be paid by the father to his wife, and a like amount to Blowers as trustee for the daughter, and it is adjudged that the amount paid Blowers "shall be expended by him in his discretion for the benefit of the minor child, including her education, support, maintenance, medical attention and other necessary items of expenditure." (R., folios 535, 538). It is then provided that "upon compliance of this order by the plaintiff he shall be relieved of **all payments of alimony** and counsel fees in said case",—except, however, the requirement of making a $50.00 payment which was due under a prior order of the court.

The case of *Bates v. Bodie* (245 U. S., on page 526) is authority for the proposition that *"for the issues we must go to the pleadings; for the response to them and their determination, to the judgment; and that each may furnish a definition of the other."*

The highest and most authoritative evidence that the term "permanent alimony", as used in the decree, is applicable to the provision made for the support of the child (as well as being applicable to the provision made for the support of the wife) is also afforded by reference to the Georgia Code and decisions of the Georgia court giving it interpretation and effect.

The caption of Section 2981 (shown by reference to "Appendix B") reads: "ALIMONY FOR CHILDREN ON FINAL TRIAL."

In numerous of the Georgia decisions "alimony" is used in referring to the provision for the support of children as well as for the wife. The word is so used in *Coffee v. Coffee,* 28 S. E., 977. In *Gilbert v. Gilbert,* 107 S. E., 490, 492, the Court speaks of "the amount allowable as alimony as support for the children." In *Gaines v. Gaines,* 150 S. E., 645, the statement of facts recites that the wife prayed for "permanent alimony for the support of herself and child," and that an order had been passed requiring "the defendant to pay $20.00 per month as alimony for the support of the child." And in the prevailing opinion, in referring to the *Coffee case,* the Court says that Coffee was required to pay "$5.00 monthly on account of

alimony for his children." In *Pace v. Bergquist*, 159 S. E., 678, the Court speaks of the allowance for the child as "an allowance in the nature of alimony," and also refers to the *Coffee case* as a case where the allowance for the wife and children was "in full settlement of both temporary and permanent alimony."

The decree of the Georgia court—awarding the custody of the child to the mother and requiring the payment of a specified total amount for the support of the child—was effective to absolve the father from further legal obligation or duty to support the child.

The position of the petitioner is that the effect of the Georgia divorce decree was to absolve him from liability to support the minor daughter, and that the courts of South Carolina are bound to recognize that effect of the decree under the full faith and credit clause of the federal Constitution.

Minor children are never formal parties to a divorce suit between their parents, yet in all such cases the courts make disposition of the custody of the children and provide for their maintenance; and, in disposing of the questions of custody and maintenance, what is done is as binding on the child as it is on the parents. All the cases hold that the court having jurisdiction of the parents in a divorce suit, in destroying the marital relationship, has jurisdiction to deal completely with that relationship by determining—as incidental questions—the matter of the custody and support of the children.

In *Coffee v. Coffee*, 101 Ga. 787, 28 S. E. 977 (where application was made by the wife for the allowance of alimony, temporary and permanent, and a consent decree was made awarding the wife a sum certain, to be paid at stated intervals, and to be by her applied to the support of the minor children), the court held that, after the termination of the divorce suit, and the rendition of a final decree therein, which was not excepted to, the decision allowing alimony had passed beyond the discretionary control of the Circuit Judge, and he had then no authority either to abrogate it or to modify its terms. In this connection, the court said:

"In the present case, the parties dispensed with a jury trial upon the question of an allowance of permanent alimony, and, by consent, invoked a decree of the court fixing the allowance upon the terms stated in the decree. This consent having been approved by the court in which the cause was pending, after the grant of the divorce, the court loses control over the subject and the decree stands as other judgments against the husband."

The later Georgia cases have repeatedly recognized and reaffirmed the doctrine of the Coffee decision.—See: *Johnson v. Johnson*, 131 Ga. 606, 62 S. E. 1044; *Gilbert v. Gilbert*, 151 Ga. 520, 107 S. E. 490; *Robison v. Robison*, 29 Ga. App. 521, 116 S. E. 19; *Sikes v. Sikes*, 158 Ga. 406, 123 S. E. 694; *Hooten v. Hooten*, 168 Ga. 86, 147 S. E. 373; *Gaines v. Gaines* (Ga.), 150 S. E. 645; and, particularly, *Pace v. Bergquist*, (Ga.), 159 S. E. 678, (the latter decision having been *erroneously* regarded in the South Carolina Supreme Court opinion as authority for the position that a consent order is not a final judgment as to the amount of alimony payable for the support of the child.

POINT B

The Georgia Court had jurisdiction in the divorce action between the parents to pass upon all matters pertaining to the custody and support of the children.

A point considerably stressed in the opinion of the South Carolina Supreme Court, and, also, in the opinion denying the petition for rehearing, is that the minor child, Sadie Yarborough, was resident in another state at the time of the divorce proceedings, was not a formal party to the action, was not represented by guardian *ad litem*, was never served in any way with process, and was never within the jurisdiction of the Georgia Court.

On such premise it is said in the opinion that "it is certain that the Supreme Court of Fulton County, of the State of Georgia, while acquiring jurisdiction of W. A. Yarborough

and Susie B. Yarborough, never acquired jurisdiction of the person of the infant, Sadie Yarborough, in the suit for divorce between the parents."

We have not found any similar holding in the cases. On the contrary, it has been repeatedly recognized in the decisions and is the customary practice,—under the construction given by the courts to the Georgia statutes,—that questions of the custody of the children and allowances for their support are to be determined in divorce actions (to which the children are not parties) as fully as if they had been made parties in the action. The Georgia decisions cited under our discussion of "Point A" are illustrative.

The South Carolina case of *Exchange Banking & Trust Co. v. Finley,* 73 S. C. 423, 53 S. E., 649, recognizes, without discussion, that a judgment in divorce proceedings in the State of Illinois absolved the father from all legal obligations to support the child. There is no suggestion in the opinion that the Illinois action was in any way different from an ordinary divorce action where the court determines the matter of custody and support of the child as a matter necessarily incident to the divorce proceedings. It is obvious that the mere presence of the child in Illinois where the decree was rendered, could not give the court a broader jurisdiction, or the decree greater efficacy or validity, than would otherwise have been the case.

In *Anderson v. Anderson,* 74 W. Va. 124, 81 S. E. 706, 707, the wife brought suit for divorce in Indiana, and the husband was personally served within the jurisdiction. Either before or shortly after the service upon him, he took the children and sent them to West Virginia, and later himself moved there. He filed an answer in the divorce suit, contesting it on jurisdictional grounds, as well as on the merits. The divorce was granted the wife, and she was awarded the custody of the children. She then went to West Virginia and instituted habeas corpus proceedings for the custody of the children. The father attacked the Indiana decree of divorce on various grounds, among others, that the Indiana court had no jurisdiction to award the custody of the children to the mother because they

were in West Virginia when the suit for divorce was commenced, and when the final decree was entered. The wife's right to the custody of the children was sustained, the court saying:

> "That the children may not have been within the jurisdiction of the court at the time of the institution of the suit or entry of the decree is immaterial, since the parties litigant were the father and mother, and the cause of action, the right of custody, in so far as it affected the children, was between them, and the court had full jurisdiction over them, with power to render a personal decree."

In *Flack v. Flack,* 180 N. C. 594, 105 S. E. 268, 269, the Supreme Court of North Carolina held:

> "As incident to the trial of the action of divorce, the court, having jurisdiction of the cause and the parties, was fully empowered to make such disposition as to the care and custody of the children as the right and justice of the case might require."

In *Mayer v. Mayer,* 154 Mich. 386, 19 L. R. A. (N. S.) 245, the wife obtained a divorce in Oklahoma. It awarded her the custody of the children, and required the husband to pay her a certain monthly sum during her life or until she married again, and also to pay a certain sum monthly for the support of the children until the children came of age "or until the further order of the court". After the divorce proceedings the wife took the children and moved to New York, while the husband went to Detroit. The wife later moved to Detroit and brought this suit for arrears of alimony due her as well as the children. The court held that she was entitled to a judgment for the alimony due her, since the award of the Oklahoma court was a final judgment, but that the complaint should be dismissed as to the alimony due the children because the award of the Oklahoma court was not a final judgment, being subject to modification at any time by that court. From the opinion it is clear that the fact that the children were not formal parties to the Oklahoma divorce suit was not a factor in the

decision, and the court would have sustained a judgment for the children's alimony if the Oklahoma judgment had been a final judgment as to the children's alimony.

In *Sistare v. Sistare*, 218 U. S. 1, the wife obtained a decree of separation and for alimony of $22.50 per week for the support of herself and a minor child in the courts of New York. She thereafter sued the husband in Connecticut for arrears of alimony. She obtained judgment, which was reversed by the Supreme Court of the State, and the case went to the United States Supreme Court. This court held that the decree for alimony for the mother and child was a final decree, not subject to modification, and being such the courts of Connecticut were bound, under the full faith and credit clause of the federal constitution, to recognize it, and, therefore, that the wife was entitled to enforce the judgment in the Connecticut action.

All of the foregoing cases are authoritative, either expressly or by clear and necessary implication, for the proposition that it is not necessary for a child to be a formal party to a suit for separation or divorce wherein the child's right to support is adjudicated and the decree is binding on all courts. The conclusion would seem inevitable (a) that a child is not a necessary party to its parent's divorce; (b) that assuming the foreign court has jurisdiction of the parents, it has jurisdiction of the matter of the child's support; (c) that a judgment for such support, which is final and not subject to modification, is a valid judgment; and (d) that it must be recognized under the federal constitution.

The matter of the actual residence of the child has nothing to do with the question of the court's jurisdiction. In such cases, the court is dealing with a status,—the marital relationship,—and the court having jurisdiction of the parents in a divorce suit, has jurisdiction to destroy the marital relationship and, incidently to deal completely with the rights and duties of the parties to the relationship, which includes the children whose custody and support must be determined by the court. The State of Georgia, therefore, having to fix the allowance for the permanent support of the child of divorced

parents, and the state having exercised that power under a statute specifying how such permanent support shall be fixed and that when so fixed the father shall be absolved from further liability for support, the child is as much bound thereby as if it had been a formal party to the suit.

It is a fundamental proposition that the child's legal domicil at the time of the divorce, was in Georgia, where her father was domiciled.—*Lamar v. Micou,* 112 U. S. 452.

Even as to the wife, Susie Yarborough, the principle applies that a voluntary separation does not operate to give the wife a different domiciliation in law from that of her husband.—*Barber v. Barber,* 21 How. 582. In this connection, in *Anderson v. Watt,* 138 U. S. 694, 706, it has been said: "*And although the wife may be residing in another place, the domicil of the husband is her domicil.* Story Confl. Laws, sec. 46; Wharton Confl. Laws, sec. 43; and cases cited. Even where a wife is living apart from her husband without sufficient cause, his domicil is in law her domicil."

Neither in the record of the Georgia divorce proceedings, nor in the testimony given in the present case, do we find any facts sufficient to take the wife, Susie Yarborough,—prior to the granting of the divorce decree,—out of the application of the rule declared. It is obvious that the child's living with her mother in Hendersonville, N. C. (where she was living at the time of the commencement of the divorce proceedings) was not sufficient, of itself, to change her legal domicil from the State of Georgia. It was not until the decree of the Georgia Court allowing the mother custody of the child, that the child had a different domiciliation in law from that of her father.

It may also be regarded as definitely established in the courts of the State of South Carolina, as well as in the courts of the State of Georgia, that it is not the duty of the father to maintain the child except at the place of his residence. In a comparatively recent decision—*State v. Lancaster,* 135 S. C. 412, 416—we find statement of this principle, as follows: " 'A husband is only required to furnish the necessities of life (to his wife), at *his* place of residence'; unless 'he destroys his home

and provides no other place where she can live'. *State v. Stone*, 111 S. C. 498. 'The same rule applies to child'. *State v. Scurry*, 114 S. C. 192."

Similarly in *Thompson v. Ga. Ry. & Power Co.*, 163 Ga. 598, 136 S. E. 895, we find the statement that the duty of the parent to support the child *and the right to the custody and services of the child* are reciprocal.

To similar effect, also, is *Meyer v. Nebraska*, 262 U. S. 390, 400, where it is said: *"Corresponding to the right of control*, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all of the states, including Nebraska, enforce this obligation by compulsory laws".

As indicated in *Meyer v. Nebraska, supra*, it is generally,—if not universally—regarded, whenever the subject has been considered, that it is only by virtue of the state laws that the duty of the father, in respect of the support of the child, can be enforced.

As pointed out in *Cunningham v. Cunningham* (— Tex. —, 40 S. W. (2d) 46, 75 A. L. R. 1305, 1312), Corpus Juris states "the rule is that the power of court to allow permanent alimony is wholly statutory and usually the statutes make provision therefore" (19 C. J. sec. 566, p. 243); and that "ordinarily a minor child has no direct right of action in equity against his parent to compel the performance of the laws of duty in respect of maintenance and education". (46 C. J. sec. 50, pp. 1270, 1271).

Similarly, in *Rawlings v. Rawlings* (— Miss. —, 83 So. 146, 7 A. L. R. 1259, 1260), reference is made to 21 Am. & Eng. Enc. Law, 2d ed. 1052, where it is said: "The moral obligation of a parent to support his child is not directly enforcible, *and a court of equity cannot compel the performance of this duty*. The duty may be enforced, however, under statute, or indirectly, as where a stranger supplies an infant with necessaries and recovers therefore against the parent."

The case of *Sikes v. Sikes*, 158 Ga., 406, 123 S. E. 694, is in point to show that the enforcement of the father's duty of

support is treated under the Georgia statutes as making provision that in suits for divorce a support may be allowed the children (without regard to whether the wife is found entitled to alimony) and a judgment for the same enforced as provided by law. But, as the court pointed out, there is no provision in the law, where the wife and mother is dead, for a minor child by his guardian or next friend, to maintain a suit for alimony. The court said: "This is not a petition in equity for the recovery of an amount which the father might be required to pay for the support of the minor child, *even if such equity petition could be maintained*". And, in *Brown v. Brown*, 24 Ga. App. 512, 101 S. E. 315, it is held that the mother who has obtained a decree for alimony and for the support of herself and minor child in another state cannot maintain an original action at law in Georgia, even to recover necessary expenditures made by her after such decree, for the support of the child.

We have found no decision,—and none has been indicated in the opinion in this cause,—that afforded precedent to the South Carolina Supreme Court for its departure from the originally recognized principles declared in the above authorities. There is nothing, certainly, in the South Carolina statutes (the pertinent provisions of which appear herein as "Appendix C" of this petition) to warrant the child's bringing of an action against the father, in her own behalf, to compel him to make an allowance for her support.

The Decree of the Georgia Court determined and adjudged the rights and duties of the father in respect of the custody and support of the child; and rendered the said issue (in respect of the support of the child) res adjudicata within the protection of the full faith and credit clause of the Constitution of the United States.

The applicability of the full faith and credit clause to the Georgia judgment (the decree of January 19, 1929) rests on the interpretation of the Georgia law, the issues made by the pleadings in the Georgia divorce case, and the decree of the court granted therein.—*Bates v. Bodie*, 245 U. S. 520; *Sistare v. Sistare*, 218 U. S. 1; and *Am. Surety Co. v. Baldwin* (United

States Supreme Court Advance Opinions—decision of November 14, 1932).

In *Bates v. Bodie*,—where the question was whether a Nebraska decree gave full faith and credit to an Arkansas decree allowing a stated sum in full of alimony,—Mr. Justice McKenna, speaking for this court, said: "We are not called upon to trace or consider the reason of the opinion further than to determine the correctness of its elements, and this determination can be made by reference to the divorce proceedings in Arkansas and the decree of the court rendered therein. * * * But how find the matters in issue or the points controverted upon the determination of which the judgment was rendered? The obvious answer would seem to be that **for the issues we must go to the pleadings; for the response to them and their determination, to the judgment;** and that each may furnish a definition of the other". (245 U. S. at p. 525, 526).

In *Sistare v. Sistare*,—in discussing a closely similar situation where the Connecticut court undertook to construe the effect of a New York court decision,—this court said: "While the ruling of the court was, of course, primarily based upon the interpretation of the (New York) law, the ultimate ruling as to the inapplicability of the full faith and credit clause of the Constitution was expressly rested upon the decision of this court".

An authoritative statement in point appears, also, in the recent case of *American Surety Co. v. Baldwin, supra*, where it is said: "The full faith and credit clause, together with the legislation pursuant thereto, applies to judicial proceedings of a state court drawn in question in an independent proceeding in the federal (or other) courts. * * * The principles of *res adjudicata* **apply to questions of jurisdiction** as well as to other issues. *Baldwin v. Iowa State Traveling Men's Asso.* 283 U. S. 522, 75 L. ed. 1244, 51 S. Ct. 517. They are given effect even where the proceeding in the federal (or other) court is to enjoin the enforcement of a state judgment, **if the issue was made and open to litigation in the original action,** or was determined in an independent proceeding in the state courts."

CONCLUSION

In view of the nature of the case, the manifest oversight appearing in the opinion of the fundamental principles and considerations governing the application of the full faith and credit clause of the Constitution of the United States, and the dangerous precedent which would be established if the opinion should be allowed to stand, it is respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, in order that the error of the South Carolina Supreme Court, in the holdings declared in its said opinion, may be corrected; and it is submitted that to such end a writ of certiorari should be granted and this court should review the decision of the South Carolina Supreme Court and finally reverse it.

Dated: March 20, 1933.

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